frontier

Legal Services

180 South Clinton Avenue
Rochester, NY 14646-0700
(716) 546-7823 Fax

Michael J. Shortley, III
Senior Attorney

Telephone: (716) 777-1028

June 10, 1996

BY OVERNIGHT MAIL

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 96-115

Dear Mr. Caton:

Enclosed for filing please find an original plus thirteen (13) copies, two of which are marked "Extra Public Copy," of the Comments of Frontier Corporation in the above-docketed proceeding.

To acknowledge receipt, please affix an appropriate notation to the copy of this letter provided herewith for that purpose and return same to the undersigned in the enclosed, self-addressed envelope.

Very truly yours,

Michael J. Shortley, III

cc: Ms. Janice Myles (cover plus diskette)

International Transcription Service

0+13

9372.1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	**CC Docket No. 96-115**
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	

COMMENTS OF FRONTIER CORPORATION

Michael J. Shortley, III

Attorney for Frontier Corporation

180 South Clinton Avenue
Rochester, New York 14646
(716) 777-1028

June 10, 1996

Table of Contents

Summary

In adopting regulations implementing new section 222 of the Communications Act, the Commission should take the following steps

(1) adopt CPNI regulations that define a "telecommunications service" relatively broadly, and limit the types of information that qualify as CPNI to those precisely described in the Act;

(2) assuming (1), adopt regulations that require written customer authorization for the use or release of CPNI;

(3) adopt regulations that fully enforce the Act's provisions regarding the confidentiality of carrier information; and

(4) preempt state regulation that is inconsistent with rules that the Commission ultimately adopts.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	**CC Docket No. 96-115**
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	

COMMENTS OF FRONTIER CORPORATION

Introduction

Frontier Corporation ("Frontier"), on behalf of its incumbent local exchange, competitive local exchange, interexchange and wireless affiliates, submits these comments in response to the Commission's Notice initiating this proceeding.[1] In adopting regulations implementing section 702 of the Telecommunications Act of 1996 ("Act") -- which added new section 222 to the Communications Act of 1934[2] -- the Commission should attempt to strike a reasonable balance in a manner that comports with the language of the Act. On the one hand, the Act codifies legitimate privacy rights of individual subscribers that telecommunications carriers must accommodate. On the other, the Commission should

---

1 *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Dkt. 96-115, Notice of Proposed Rulemaking, FCC 96-221 (May 17, 1996) ("Notice").

2 47 U.S.C. § 222

decline to adopt regulations that would frustrate the ability of carriers to offer to their customers integrated communications solutions

Toward this end, the Commission should

(1) adopt CPNI regulations that define a "telecommunications service" relatively broadly, and limit the types of information that qualify as customer proprietary network information ("CPNI") to those precisely described in the Act;

(2) assuming (1), adopt regulations that require written customer authorization for the use or release of CPNI;

(3) adopt regulations that fully enforce the Act's provisions regarding the confidentiality of carrier information; and

(4) preempt state regulation that is inconsistent with rules that the Commission ultimately adopts.

Argument

I. THE COMMISSION SHOULD ADOPT CPNI REGULATIONS THAT FURTHER THE ACT'S PURPOSES.

The central purpose of the Act is to promote competition in all telecommunications markets. A principal means through which providers will compete is to offer customers full packages of communications goods and services At the same time, section 222 codifies legitimate customer privacy expectations. Thus, the Commission must necessarily balance these goals in enacting regulations implementing section 222. That is, customer privacy expectations must be accommodated without unnecessarily constraining the ability of carriers to compete.

Section 222(c)(1) provides that:

> A telecommunications carrier that receives or obtains customer *proprietary network information* by virtue of its provision of *a telecommunications service* shall only use, disclose or permit access to individually identifiable customer proprietary network information in its provision of (A) *the telecommunications service* from which such information is derived or (B) services necessary to, or used in, the provision of *such telecommunications service*, including the publishing of directories.[3]

In addition, section 222(f)(1) provides that

> (1) CUSTOMER PROPRIETARY NETWORK INFORMATION — The term 'customer proprietary network information' means — (A) information that relates to the *quantity, technical configuration, type, destination and amount of use* of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
>
> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;
>
> except that such term does not include subscriber list information.[4]

The language of section 222 presents the Commission with two threshold questions: (a) What constitutes a "telecommunications service" to which the CPNI provisions apply? and (b) What constitutes CPNI that is subject to protection?

---

[3] 47 U.S.C. § 222(c)(1) (emphasis added)

[4] 47 U.S.C. § 222(f)(1) (emphasis added)

With respect to the first question, the Commission correctly proposes to classify telecommunications services into local exchange, toll and wireless services.[5] That is an appropriate division at this time. Under the Commission's proposed classifications, for example, a local exchange carrier could not use CPNI to market its interexchange or wireless services absent customer consent.[6] These classifications comport with the Act's intent that CPNI may, in general, not be used to cross-sell services. These classifications also align with the two major service classifications found in the Act itself, namely, "telephone exchange service" and "telephone toll service."[7]

However, any narrower definition would erect virtually insurmountable barriers to carriers' attempts to offer feature-rich service offerings. Were the Commission to define a "telecommunications service" as each individual component subscribed to by a customer, no carrier would be able effectively to market optional features. Under such an approach, a local exchange carrier could not use the fact that a customer has subscribed to call waiting to market call forwarding or Caller ID to that subscriber. An interexchange carrier could not use knowledge that a customer has subscribed to a particular optional calling plan to recommend more economical alternatives. And, a cellular carrier could not use information regarding the optional services to which a customer has subscribed in order to market voice mail.

---

5 Notice, ¶ 22.

6 *See id.*, ¶ 22, n.59.

7 47 U.S.C. § 221(f)(1)(B).

Such results would make no sense. Carriers would not be permitted to offer valuable, related service options to their customers. Likewise, consumers would be denied valuable information regarding features and options available to them. This interpretation could not possibly comport with the pro-competitive purposes of the Act. On its face, it would disserve both consumers and carriers alike.

Rather than embark on this curious course of action, the Commission should adopt its proposed classifications. In this manner, CPNI regarding a customer's *local* service could not be used to market *interexchange* service -- which the Act contemplates -- but it would permit carriers to market related valuable features as options or "add-ons" to the customer's basic telecommunications services.[8]

With respect to the second question, the Commission must bear in mind that only the use of customer *proprietary network* information is subject to the strictures of section 222; other customer information is not.[9]

By its terms, section 222(f)(1) *excludes* subscriber list information from the definition of CPNI. It is therefore, evident, that a carrier (an interexchange carrier, for example) may

---

[8] The Commission inquires as to the effect of the convergence of telecommunications technologies and service offerings on its proposed CPNI regulations. Notice, ¶ 22. This is certainly a legitimate area for inquiry. For the moment, however, the Commission's proposed classification is workable, because such convergence is not widespread and most CPNI held most local exchange companies was obtained by virtue of their historical monopolies. If and when all markets become more fully competitive, the Commission may revisit this issue.

[9] As is discussed *infra* at 10-11, the identity of the customer is also critical. While a carrier should have flexibility in dealing with its own end-user customers, a carrier should be severely constrained in dealing with the end-user customers of its wholesale customers.

use its customer list to market other telecommunications services (local or wireless services, for example) to its customers.

In addition, the definition of CPNI basically tracks the Commission's *Computer II* and *Computer III* definitions.[10] These cover network configuration and usage information. Other customer information does not fall within this definition. Thus, while a carrier may not use network or usage information relating to one type of telecommunications service (*e.g.*, interexchange) to market another type of telecommunications service (*e.g.*, local exchange), it may use other customer information for this purpose.

The definitional questions presented by the language of section 222 raise important issues that the Commission must address. The flexible approach that Frontier suggests reconciles the competitive and privacy mandates set forth in the Act.

II. THE COMMISSION SHOULD REQUIRE WRITTEN CUSTOMER AUTHORIZATION FOR THE USE OR RELEASE OF CPNI.

Two parts of section 222 address the use of CPNI with the consent of the affected customer. A carrier may not use CPNI to market its own services absent "the approval of the customer."[11] Disclosure to third parties is permitted only "upon affirmative written request of the customer."[12]

---

[10] *See* Notice, ¶ 8 n.30.

[11] 47 U.S.C. § 222(c)(1).

[12] 47 U.S.C. § 222(c)(2).

Assuming that it adopts the narrower view of the scope of section 222 set forth above, the Commission should apply these two provisions in a manner that best tracks the Act's pro-competitive policies and avoids subsequent disputes between a carrier and a customer regarding improper use of CPNI. The best way to accomplish this result is to require written customer authorization for the use or disclosure of CPNI other than as expressly permitted by section 222.[13]

The existence of a written document, signed by the customer, for any otherwise-proscribed CPNI use or disclosure will create competitive parity. It will also provide a clear and reliable paper trail -- given that internal transactions within a firm tend to be more ambiguous than those between firms. The current *Computer III* rules, which permit the use of a "negative option" (or no option at all),[14] do not serve this purpose. They effectively provide to the large ILECs the advantage of being able to hide such negative options in the

---

The Act also addresses inbound telemarketing (47 U.S.C. § 222(d)(3)), a subject addressed *infra* at 9.

13 The Commission may wish to consider exempting telecommunications carriers other than large incumbent local exchange carriers from the proposed requirement that carriers obtain written customer consent for disclosure of CPNI internally. The Commission has historically distinguished between the Bell companies (and GTE) and others in this respect. For example, the Commission previously declined to extend the full panoply of its nonstructural safeguards to non-Bell exchange carriers, because it recognized that the cost of compliance would outweigh whatever benefits might be obtained. *See Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies*, CC Dkt. 86-79, Report and Order, 2 FCC Rcd. 143, 157-58 (1987).

14 Under the *Computer III* rules, the Bell companies are permitted to use CPNI without prior authorization to market customer premises equipment and to use such information without customer consent with respect to customers that subscribe to twenty or fewer lines to market enhanced services. *See Bell Operating Company and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd. 7571, 7605, 7609 (1991).

routine, ongoing paper-based contacts that they have with their large, geographically-concentrated customer bases. While those rules may have been appropriate in the limited contexts of enhanced services or customer premises equipment, they cannot adequately address the potential anti-competitive results that could occur if the Bell companies are permitted to use such information to facilitate their potential entry into the in-state, interexchange business.[15] Moreover, the *Computer III* rules do not comply with the Act's clear mandate for customer approval -- which denotes an affirmative granting of permission. A negative option is passive, at best, and does not truly allow for a customer's affirmative grant of approval.

A requirement that a carrier obtain written authorization prior to releasing CPNI will also minimize the need to adjudicate future disputes between carriers and customers regarding whether CPNI had been properly or improperly utilized. The experience with interexchange primary interexchange carrier ("PIC") change rules should counsel strongly against adopting a "best efforts" or oral authorization standard. As the Commission has

---

[15] As the Commission correctly recognizes (Notice, ¶¶ 35-36), certain of the procedural safeguards that the Commission adopted in the *Computer III* context (*e.g.*, password access to data bases) should be retained and appropriately modified to cover interexchange services. These safeguards are necessary to prevent the inappropriate use of CPNI regarding such customers' local services to provide a "launching pad" for the Bell companies' entry into the in-state, interexchange business

recognized,[16] an unacceptable amount of "slamming" has occurred. The Commission should not export these results into another arena.[17]

The Act provides a *limited* exception to the use of CPNI for the marketing of other telecommunications services. Section 222(d)(3) excludes from the general strictures of section 222 the use of CPNI:

> to provide an *inbound* telemarketing, referral or administrative services *for the duration of the call, if the call was initiated by the customer* and if the customer approves of the use of such information to provide such service [18]

This exception is limited. On a call *initiated by a customer*, a carrier may use CPNI to market other telecommunications services with the customer's approval of the use. That is, the script must propose an affirmative approval by the customer (*e.g.*, "May I tell you about our long-distance services and, using the information we have on your usage, suggest the best calling plan?"). The carrier may not initiate the call. Moreover, as the Act provides, the consent for the use of CPNI should be limited to the "duration of the call" and not be extended to permit the use of CPNI for any purpose at any time thereafter.

---

16 *See Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Dkt. 94-129, Report and Order 10 FCC Rcd. 9560, 9560-61 (1995).

17 If the Commission decides that written authorization for CPNI release should not be required in all circumstances, it should at least adopt rules modeled after its telemarketing regulations for PIC changes. *See Policies and Rules Concerning Changing Long Distance Carriers*, CC Dkt. 91-64, Report and Order, 7 FCC Rcd. 1038 (1992). At least, such regulations would provide some level of protection of CPNI

18 47 U.S.C. § 222(d)(3) (emphasis added)

III. THE COMMISSION SHOULD STRICTLY SAFEGUARD THE CONFIDENTIALITY OF CARRIER INFORMATION.

Section 222(b) provides that:

> A telecommunications carrier that receives or obtains proprietary information from another carrier for the purpose of providing any telecommunications service shall use such information only for such purpose, and *shall not* use such information for its own marketing purposes.

The sweep of section 222(b) is broad and an expansive interpretation is critical to ensure that the Act's pro-competitive mandate is not frustrated. The Act contemplates that a carrier may purchase unbundled elements/interconnection from another carrier[19] or may resell the other carrier's retail services.[20] In the course of providing such interconnection or wholesale services, the underlying carrier will, of necessity, gain critical knowledge regarding its carrier-customer's end-user customer base.

The Commission should adopt rules that proscribe the use of any information by the underlying carrier gained as a result of the carrier-carrier relationship to market services to the reselling or interconnecting carrier's end-user customers. This prohibition must include not only CPNI as defined in the Act but also subscriber list information. Particularly for a new entrant, a carrier's subscriber list is the lifeblood of its business and is most

---

19 47 U.S.C. §§ 251(c)(2)-(3).

20 47 U.S.C. § 251(c)(4).

definitely proprietary to that carrier.[21] Moreover the underlying carrier possesses this knowledge of its carrier-customer's subscriber information solely because of its "provi[sion] of [a] telecommunications service" and, thus, in the plain words of the Act, it "shall not use such information for its own marketing purposes."[22]

Such a rule is consistent with the distinction drawn in the Act between CPNI and subscriber list information. Section 222(b) uses the term "proprietary information," not the term "*customer* proprietary *network* information." The distinction manifests a Congressional intent that a broader array of information acquired as a result of the carrier-carrier relationship is to be protected than is information acquired as a result of the carrier-end-user relationship. Moreover, to the underlying carrier, the subscriber is the resale or interconnecting carrier and not the latter's end-user customers. The underlying carrier has no relationship whatever to the resale or interconnecting carrier's end-user customers.

The broad prohibition that Frontier advocates is absolutely essential to advance the Act's pro-competitive goals.[23]

---

21 This is to be distinguished from the "subscriber list" of an incumbent local exchange carrier where that subscriber list is -- with the exception of non-published and non-listed subscribers -- published in the white pages directories

22 *Id.*

23 This is not to say that an underlying carrier may not market its services to a resale or interconnecting carrier's customers. That result would be completely antithetical to the pro-competitive goals of the Act. It is only to say that the underlying carrier may not use information it possesses solely as a result of the carrier-carrier relationship to advantage itself unfairly against its carrier customer

IV. THE COMMISSION SHOULD PREEMPT INCONSISTENT STATE ACTION.

The Commission inquires whether it possesses the authority to -- and whether it should -- preempt potentially inconsistent state action in this area. The short answer is yes.

The Act itself establishes federal primacy in this area. Although the Act permits states to adopt *access* regulations "not inconsistent" with this Commission's section 251 regulations,[24] it does not confer that same authority upon the states with respect to CPNI regulations. This is not surprising, for it is not an area in which differing federal and state rules may be accommodated. A carrier may not practically operate under a regime in which one (or more) states adopt CPNI rules that differ from this Commission's rules. In virtually identical circumstances, the courts have traditionally upheld the Commission's exercise of its preemption authority.[25]

Early preemption is necessary to prevent the frustration of valid national objectives. It would also focus the states on the important, but subordinate,[26] tasks entrusted to them under section 252.

---

24 47 U.S.C. § 251(d)(3).

25 *See, e.g., California v. FCC*, 39 F.3d 919 (9th Cir.), *cert. denied*, 115 S. Ct. 1427 (1995); *Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1989); *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1983).

26 *See Implementation of the Local Competition Provisions on the Telecommunications Act of 1996*, CC Dkt. 96-98, Comments of Frontier Corporation at 5-6 (May 15, 1996).

Conclusion

For the foregoing reasons, the Commission should act upon the proposals contained in the Notice in the manner suggested herein.

Respectfully submitted,

Michael J. Shortley, III

Attorney for Frontier Corporation

180 South Clinton Avenue
Rochester, New York 14646
(716) 777-1028

June 10, 1996